IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 640 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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PARSING VEACHLA RATHVA - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR HEMANT B RAVAL for Appellant(s) : 1,
MS DS PANDIT, LD.APP for Respondent-State.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 27/07/2007

ORAL JUDGMENT

1. The appellant-orig.convict (hereinafter referred to as 'the appellant') has preferred present appeal under Section 374 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction and sentence

dated 07th February 2005 passed by the learned Additional Sessions Judge, Fast Track Judge, Fast Track Court, Chhotaudepur, in Sessions Case No.62 of 2003, whereby the learned trial Judge has held the appellant herein guilty for the charge of offence punishable under Sections 376, 366 and 363 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for seven years for the offence punishable under Section 376 of the Indian Penal Code; and rigorous imprisonment for four years for the offence punishable under Section 363 of the Indian Penal Code. The learned trial Judge has also sentenced the appellant for rigorous imprisonment of 5 years for the offence punishable under Section 366 of the Indian Penal Code. The appellant is also asked to pay a fine of Rs.1000/- for each of these three offences and in default punishment for all the three offences imposed is simple imprisonment for one month. The basic case of the prosecution is reflected in the charge framed which is at page no.23 of the paper-

book. It would be beneficial to reproduce the relevant part of the charge framed which runs as under :

(i) That on 22nd March 2003 at about 10-00 hrs. or during that period, the victim of the present case namely Sangitaben Abhesingbhai, who was aged less than 18 years, was going to see fair near Moragana village cross roads with the other witnesses of the present case. At that time, you the accused persons have kidnapped the minor girl Sangita without taking consent of her guardians and in collusion with one another committed offence punishable under Sections 363 read with Section 114 of the Indian Penal Code within the jurisdiction of this Court.

(ii) On the aforesaid date, time and place, you the accused persons with an ill intention to get Sangitaben Abhesing married against her wish with any

other person or though you were knowing the probability that she will be compelled or with an intention to compel her for sexual intercourse without marriage by kidnapping her or molesting her, you the accused persons in collusion with one another have committed the offence punishable under Section 366 read with Section 114 of the Indian Penal Code within the jurisdiction of this Court.

(iii) On the aforesaid date, time and place, you the accused no.1-Parsingbhai Vechlabhai have done sexual intercourse without wish and consent of Sangitaben Abhesingbhai, who is aged less than 18 years, and thereby committed rape her, at your residence at village Raychha during night hours and committed offence punishable under Section 376 of the Indian Penal Code within the jurisdiction of this Court.

(iv) On the aforesaid date, time and place,

you no.1-Parsingbhai Vechlabhai by doing sexual intercourse with Sangitaben Abhesingbhai without her wish and consent and with an intention to save himself from legal intricacies and to destroy the evidence made her bath on the next day and by getting her washed her clothes which were worn by her, committed offence punishable under Section 201 of the Indian Penal Code within the jurisdiction of this Court.

2. Total five persons originally were arrested and chargesheeted by the learned trial Judge. However, the learned trial Judge after conclusion and appreciation of the evidence decided to acquit the orig. accused nos.2 to 5 holding the appellant herein guilty for all the three charges. The prosecution case mainly rests on the evidence of victim-girl and the oral evidence of her father. One Champa who was allegedly in the company of the victim-

girl when the victim was kidnapped is also examined vide Ex.18. Shri H.B. Raval, learned counsel appearing for the appellant, has taken me through the evidence of these three witnesses and also the medical evidence. According to Shri Raval, the learned trial Judge has not considered the evidence of defence witnesses examined in appropriate manner and more than one witness examined by the accused as defence witnesses have falsified certain basis facts made by the victim and her father in the examination-in-chief and so also in the cross-examination. The evidence of victim-girl is unreliable. Even as per the doctor, she was found habitual so far as sexual activities are concerned. She had married earlier and after divorce, she was residing with her parents. It has also come on record indirectly that the appellant had expressed his intention to marry the victim girl. The conduct of the victim-girl goes against the story placed by the prosecution. There is clear element of consent. She has

stayed with the appellant for number of hours i.e. on 22nd March 2003, from the moment when she left with the appellant till 24th March 2003 when she returned to her parental home. In the meanwhile, she had not made any hue and cry or complained to the people residing in the neighbourhood of the residential premises of the appellant; unless and otherwise proved the Court should presume that the marriage of the victim-girl must have taken place on completion of her marriageable age i.e. 18 years. The previous husband of the victim-girl had appeared before the Court and deposed that the victim-girl was once his wife. Even marriage invitation card is also tendered in the evidence and she has denied such a crucial fact and she had claimed that she was an unmarried girl. On the contrary, she posed a question to the defence counsel as to he is talking about who marriage and when such marriage had taken place. There was no reason for the victim-girl to take such a stand an the learned trial Judge, according to Shri

Raval, has committed grave error in accepting the version of the victim as gospel truth. Two important witnesses who also could have been examined have not been examined. PW-Champa who has been examined vide Ex.18 is a close relative of the victim-girl. This witness is the sister of Abhesingbhai-father of the victim-girl. The other two females were also there when the alleged incident took place and they have been named in the complaint as witnesses to the incident. These two witnesses Manjulaben and Laxmiben or at least one of them could have been examined. According to the prosecution, the victim-girl was proceeding towards a place where the community fair was arranged and all the four females i.e. victim-girl, Champaben, Manjulaben and Laxmiben were proceeding towards the said place and when they were on their way to fair, the appellant intercepted them and kidnapped the victim forcibly with him. It is further the case of the prosecution that Champaben, Manjulaben and Laxmiben tried to rescue the

victim but they had failed. The conduct of Champaben after the alleged incident is found strange and highly improbable and, therefore, the say of Champaben also ought to have been accepted by the learned trial Judge, is also the submission. Undisputedly, the victim-girl was more than 16 years of age and had married earlier with one Ishubhai Kevlabhai. This Ishubhai Kevlabhai has been examined as DW-2 vide Ex.50. He has identified the photographs of victim-girl and has also assigned reasons as to why the divorce between him and the victim-girl had taken place. According to him, the victim-girl had taken Rs.5000/- from him at the time of getting divorce. For short, the learned trial Judge has ignored various crucial aspects and has linked the appellant with the crime for no good logical or legal reasons.

3. Shri P.D. Bhate, learned Additional Public Prosecutor, after going through the evidence led by the witnesses and other aspects, has fairly submitted that the learned trial Judge

has committed grave error in appreciating the evidence. It is true that the appellant can be linked with the crime in a case like rape, on the sole testimony of the victim and if the Court is of the view that the Court is able to hear the ring of truth in the evidence of the victim then the Court can say that the prosecution has successfully established the charge beyond reasonable doubt. But in the present case it appears that it would not be safe for the Court to place reliance on the version of the victim-girl and there was no reason for her to conceal the fact of her previous marriage.

4. For the following reasons, I am of the view that the finding recorded by the learned trial Judge is not sustainable and, therefore, requires to be reversed :

(i) The evidence of victim-girl is not capable of inspiring confidence as she has admitted to keep curtain on crucial

aspects as to her age, and also as to her previous marriage and divorce with DW-2 Ishubhai Kevlabhai.

(ii) The victim-girl has also remained in company of the appellant on 22nd March as well as on 23rd March without any formal resistance or quarrel.

(iii) The medical evidence shows that the victim was habitual so far as the sexual activities are concerned. On one hand, the victim-girl has denied about her earlier marriage, then how such a medical opinion could have been given by the doctor examined by the prosecution. This question has not been answered properly by the learned trial Judge.

(iv) This is a case of delayed FIR and for that there is no explanation from the prosecution.

(v) The conduct of PW-2 Champaben, who has been examined vide Ex.18, is highly improbable. She was a grown up lady. She could have made hue and cry. Ultimately,

four females were proceeding towards the place where the fair was arranged. Number of persons may be proceeding towards the said direction and she was knowing the appellant by name and also about his village. The prosecution has not explained as to why the girl was not rescued immediately with the help of father of the victim-girl and/or other close male relatives. There was no reason to discard the evidence led by the DW and the appellant is supposed to show only probabilities. It appears that the prosecution has deliberately not disclosed the names of the persons who were in company of the appellant when the appellant allegedly kidnapped the victim-girl.

(vi) Non-examination of independent witness like Manjulaben or Laxmiben would adversely affect the merits of the case.

(vii) The evidence of PW-3 Abhesing does not carry the case of the prosecution any

further because his version is based on the story unfolded to him by the victim-girl herself.

(viii) As per the document Ex.17, the birth-date of the victim was 01st May 1985. So on the date of alleged incident, she was more than 16 years of age and the document Ex.46 shows that she was about 19 years of age when the electro roll was prepared by the State machinery. The age mentioned in the electro roll is found consistent with the fact of her earlier marriage. It is likely that on completion of marriageable age, she must have married the said DW-2 Ishubhai Kevlabhai. So these two conflicting evidence as to the age of victim-girl make the case of the prosecution doubtful even for the offence punishable under Section 363 of the Code of Criminal Procedure, 1973. If Manjulaben and Laxmiben were genuinely there with the victim-girl when she was allegedly

kidnapped. There was no reason for them for not shouting. It is admitted by the victim-girl herself that she had proposal for marriage from the appellant. Of course, she has stated that the said proposal was turned down. Whether this answer given by the victim should be accepted as truth or should be viewed with doubt, is the question. This amply suggests that the appellant and the victim were knowing each other and they had scope to talk to each other, and ultimately the appellant had asked the victim-girl to be his wife. This is not a case of ill-intention or exploitation of a weaker vessel in the male dominated society.

5. The Court while dealing with such or similar type of cases should ascertain the age of the victim girl vis-a-vis the age of the appellant, and the matrimonial status of the appellant. The Court also should consider the

class or caste to which both of them belong. The victim and the appellant both were of tribal community. So totality emerging from record takes me to a conclusion that the learned trial Judge has ignored many crucial and relevant aspects and has recorded an incorrect finding. The error committing in appreciating the evidence has led him to an erroneous conclusion and, therefore, such a judgment and order of conviction and sentence cannot be upheld.

6. So in view of above observations and discussion, the present appeal is hereby allowed. The judgment and order of conviction and sentence dated 07th February 2005, passed by the learned Additional Sessions Judge, Fast Track Judge, Fast Track Court, Chhotaudepur, in Sessions Case No.62 of 2003, is quashed and set aside. The appellant is ordered to be acquitted from all the charges levelled against him in respect of the offence in question. The bail bond executed by the appellant stands discharged. The amount of fine, if any paid, shall be refunded to the

appellant on proper identification.

(C.K. Buch, J)

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